tion in Singapore is concerned, the respondent was on February 23, 1973 fully qualified and able to fly a Boeing 737 as a pilot-in-command.

This court is in entire agreement with the lower court's finding which reads:

"According to PW3, defendant was paid a B 737 aircraft allowance at the rate of $625 a month. Defendant became a functional crew member when he was given a licence whereby he became entitled to this aircraft allowance as explained by PW2."

It is the contention of the appellants that the respondent cannot become a functional crew member until he has completed the conversion training unilaterally laid down by it. They seek to draw an analogy to the transition from a law student to a practising advocate and solicitor.

Counsel for the respondent pointed out, and I think correctly, that the analogy cannot possibly apply. In law, the "conversion" training of having to read in chambers is a legal requirement laid down by the Legal Profession Act. The conversion training stipulated by the appellants is not, however, sanctioned by any law or a legal requirement, but is purely a unilateral scheme set down by the appellants.

These facts are not in dispute. The appellants' witness, Ho Weng Toh (PW2) had deposed to the following:

"At the time he (the respondent) obtains a licence he can fly a passenger craft but he has to be with another pilot. As from February 23, 1973 he could fly a passenger carrying plane and this will be on regular flights. Department of Civil Aviation issues the licence."

He had categorically stated, and I quote:

"Conversion training is not set down by the Department of Civil Aviation."

Upon the evidence, it follows that the respondent in effect became a functional crew member upon obtaining his licence on February 23, 1973 and was accordingly entitled to a flight allowance of $625 per month from February 23, 1973 to June 15, 1973.

In the circumstances such as I have described, the order of the learned Magistrate where the figure "$2,813" appears should be varied to read "2,354.09", i.e. the words and figures "the sum of $2,354.09" being aircraft type allowance from February 23, 1973 to June 15, 1973" shall be substituted for the words and figures "the sum of $2,813 being aircraft type allowance from March 29, 1973 to August 14, 1973" occurring in the 8th and 9th lines of the said Order.

The respondent has further agreed to abandon his claim for $728 in respect of meal allowance, and the said order shall be amended accordingly, by deleting the figures and words "and the sum of $728 being the outstanding balance of meal allowance between September 1973 and April 1974" occurring in the 9th, 10th and 11th lines, and the deletion of the word "both" occurring in the 11th line thereof.

The appeal by the appellants is hereby dismissed with costs to be assessed on the higher scale.

Order accordingly.

Solicitors: *Shearn, Delamore & Co.; Allen & Gledhill.*

TEH HWA SEONG v. CHOP LIM CHIN MOH & ANOR.

[O.C.J. (Yusof Abdul Rashid J.) January 31, 1981]

[Johore Bahru — Civil Suit No. 110 of 1976]

Torts — Negligence — Road accident — Vehicle with label "Riding at your own risk" — Defence of Volenti Non Fit Injuria.

Damages — Quantum — 3½ cm. shortening of left leg — Multiple injuries — Global sum of $20,000 awarded.

The plaintiff in this case claimed for damages and loss for personal injuries sustained as a result of a motor accident caused by the alleged negligence of the second defendant. The plaintiff was a passenger in a motor lorry driven by the second defendant who was the servant of the owners of the lorry, the first defendants. The latter submitted that the plaintiff had been warned by the second defendant that he travelled in the motor lorry at his own risk and that the plaintiff was directed to a label "Riding At Your Own Risk" affixed near the passenger's seat. The defence plea was one of *non fit volenti injuria.*

As a result of the said accident, the plaintiff sustained the following injuries: (1) haematoma of the left thigh; (2) abrasions over the left forehead, the left forearm and the left loin; (3) a fracture of the lesser trochanter with a spiral fracture of the shaft of the left femur. He suffered shortening of the left lower limb by 3½ cm and marked restriction of movements of the left lower limb. There were superficial scars over the outer side of the left hip and left buttock area. The plaintiff had great difficulty in walking and he was not able to squat.

Held, allowing the plaintiff's claim: (1) to succeed in raising the defence of *volenti non fit injuria,* the defendants had to prove that the plaintiff had voluntarily and freely with full knowledge of the nature of the risk he ran impliedly agreed to incur it;

(2) in this case the plaintiff had not travelled in the lorry voluntarily and freely agreeing to undergo the risk that he might incur therefrom nor did the plaintiff know that he so travelled therein at his own risk. The first defendants were therefore vicariously liable for the negligence of the second defendant who was their employee at the material time;

(3) the plaintiff was awarded a global sum of $20,000 for the injuries sustained.

Cases referred to:-

(1) *Letang* v. *Ottawa Electric Rly. Co.* [1926] A.C. 725, 731, P.C.

(2) *Bennett* v. *Tugwell (An Infant)* [1971] 2 All E.R. 248.

CIVIL SUIT.

Upali Masacorale for the plaintiff.

Ng Kong Yeam for the defendants.

Cur. Adv. Vult.

Yusof Abdul Rashid J.: The plaintiff's claim is for damages and loss in respect of personal injuries sustained in a motor accident occurring due to the alleged negligence of the second defendant who was the servant of the first defendant. It was common ground that on January 11, 1975 about 3.35 p.m. the plaintiff was a passenger in a motor lorry No. NC 6527 owned by the first defendants and driven by the second defendant, the servant of the first defendants. At 3¾ milestone Jalan Cha'ah-Bekok, Johor, the lorry overturned.

The first defendants contended that the plaintiff had been warned by the second defendant that he travelled in the motor lorry at his own risk and that the plaintiff's attention was directed to a label "Riding

At Your Own Risk" affixed near the passenger's seat by the side of the driver's seat. It seems to me that the defence raised by the defendants was a defence of *"volenti non fit injuria"*. It was noted that the first defendants did not raise a defence that the second defendant had allowed the plaintiff to travel in the motor lorry in breach of the prohibition to do so by the first defendants.

In evidence I found the plaintiff had successfully proved that on the material date the plaintiff asked the second defendant for a lift to accompany the oil palm fruits which were to be delivered to a factory at Kluang. It was to the plaintiff's interest to know the weight of the oil palm fruits delivered to the factory as he was paid according to the tonnage harvested. On the way to Kluang due to the negligence of the second defendant in driving the lorry, the lorry overturned and the plaintiff sustained injuries as a result thereof. The second defendant denied that he was negligent in driving the said motor lorry.

Before I deal with the other aspects of the case, it is desirable to determine whether or not the accident was due to the negligence of the second defendant. The plaintiff deposed in evidence that the lorry was fully loaded with a large amount of oil palm fruits. While it was travelling on its way to the factory about 3.45 p.m. on January 11, 1975 the second defendant suddenly swerved the lorry to the left and travelled on the side-table which was lower than the level of the metal surface of the road. When the second defendant swerved back the lorry onto the metal part of the road, the lorry overturned.

The second defendant's version of the accident was: On that material day it was raining heavily. About 3¾ milestone Jalan Cha'ah/Bekok while the lorry was travelling downhill, the second defendant saw a lorry approaching from the opposite direction. As the on-coming lorry came nearer, the second defendant noticed that the on-coming lorry encroached on his path and so he swerved to the left onto the side-table. According to the second defendant there was a drain in front of him. He had to swerve to the right to avoid landing into the drain. When he did so the lorry overturned.

In cross-examination the second defendant said that the on-coming lorry was a small lorry and when it came close to second defendant's lorry, it had gone back to its correct side of the road though earlier it had encroached onto his path. Thus it was not true that had the second defendant kept to his side of the road there would be a head-on collision as he deposed in the examination in chief. The second defendant was not aware whether or not the lorry was overloaded.

Now, from the sketch plan there was no drain by the side of the road shown therein. If there was, the officer preparing the sketch plan would have drawn it. There was nothing to infer that there was a bend. The tyre marks show that only the near side tyres of the lorry went onto the side-table while the off-side tyres were still on the metal part of the road. When the second defendant lodged a report at Bekok Police Station he said that he swerved to the left while an on-coming lorry passed l n. No mention was made of the on-coming lorry e ıching onto his path.

From the evidence before me, I was satisfied that the second defendant pulled his lorry to the left when an on-coming lorry was passing him and that the on-coming lorry did not encroach onto the second defendant's path. The accident happened as a result of the second defendant violently pulling back the lorry onto the metal part of the road while a large amount of oil palm fruits was loaded on the lorry. Bearing in mind that the second defendant's lorry was going downhill, the second defendant from that vantage position had a clear view of the road in front of him and despite the fact had travelled too close to the edge of the road and had failed to keep any proper look out. It was disclosed that it was raining heavily then and the lorry was heavily loaded with oil palm fruits. In the circumstances, the second defendant being an experienced driver ought to have known that it was imminently dangerous to violently swerve the lorry from left to right. As such, I found that the accident was due to the negligent driving of the second defendant.

The plaintiff alleged that he was a lawful passenger travelling in the lorry but the defendants pleaded that the maxim *volenti non fit injuria* applied. The plaintiff testified that on that material day when he asked for a lift from the second defendant to accompany the oil palm fruits to the factory he was allowed to do so and he was not warned that he travelled in the lorry at his own risk. The uncontroverted facts showed that the second defendant was driving the motor lorry for the purposes of the first defendants.

To succeed in raising such a defence the defendants had to prove that the plaintiff had voluntarily and freely with full knowledge of the nature of the risk he ran impliedly agreed to incur it.

In *Letang* v. *Ottawa Electric Rly. Co.*[1] the Privy Council held:

"The law of Canada and England seems to be summed up in the leading proposition to Wills J.'s judgment: 'If the defendants desire to succeed on the ground that the maxim *Volenti Non Fit Injuria* is applicable, they must obtain a finding of fact that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it'."

In *Bennett* v. *Tugwell (An Infant),*[2] Ackner J. at page 253 said —

"... The defendant must prove on the balance of probabilities that the plaintiff did assent to being carried at his own risk and to exempt the defendant from liability for the negligence which caused this accident."

and regarding the effect of a notice which states "Passengers travelling in this vehicle do so at their own risk" Ackner J. said:

"... without the assistance of authority the meaning of this warning seemed to me to be clear, namely, passengers are warned that if they travel in this car, they bear the risk of the driver driving negligently. However, it was comforting to find that nearly a hundred years ago this was so decided in *McCawley* v. *Furness Ty Co.* [1872] L.R. 8 Q.B. 57...."

I would respectfully adopt and follow the proposition of law and effect of such notice as expounded by Ackner J.

On behalf of the first defendants it was disclosed that the second defendant, when he was engaged by the first defendants about two weeks before the date of the accident, was told that he was not to allow any passenger to travel in the lorry driven by him since the first defendants had not taken any insurance to cover any passenger travelling in the lorry in the event of an accident. It was also alleged that in the driver's cabin was affixed a label "Riding At Your Own Risk". I had no doubt at all that the second defendant was prohibited from taking any passengers to travel in the lorry but I was not satisfied that there was any label "Riding At Your Own Risk" affixed in the driver's cabin.

Lim Kee Tian, one of the partners of the first defendants, in his evidence before me said that there was a "Riding At Your Own Risk" label affixed in the driver's cabin of the lorry. It impressed me that the label was in English and the wordings of the notice were in fact "Riding At Your Own Risk". This impression was grounded on the statement of defence of the first defendants and the affidavits of the second defendant in support of an application to set aside the default judgment entered against him earlier. However in evidence the second defendant insisted that the purported label was in Bahasa Malaysia and it was "Dilarang Penumpang". He even spelled it out in court. As such, there was a grave doubt in my mind whether or not there was any such label affixed in the driver's cabin warning any person who wished to get a lift in the lorry that such passenger was travelling therein at his own risk. It was most probable that there was no such label.

Even assuming that there was such a label either in English "Riding At Your Own Risk" or in Bahasa Malaysia "Dilarang Penumpang", there was a doubt in my mind as to whether the plaintiff's attention was ever directed to it. The plaintiff said in evidence that he told second defendant that he had to accompany the oil palm fruits to the factory and the second defendant allowed him to travel in the lorry. According to the plaintiff the second defendant said nothing about the plaintiff's travelling in the lorry at his own risk. I believed the plaintiff. I could not believe the second defendant and rejected his evidence when he said he warned the plaintiff that the plaintiff was travelling in the lorry at his own risk and directed the attention of the plaintiff to the label "Riding At Your Own Risk" or "Dilarang Penumpang".

The second defendant was only about two weeks in the employment of the first defendants and would not know who were the responsible persons in the firm of the first defendants. Hence, it would not be surprising if the second defendant, as in this case, mistook the plaintiff as one of those responsible persons in the firm of the first defendants and had treated the plaintiff with respect and held him in deference. Under such circumstances, it was most probable that the second defendant had not deemed it necessary to question the right of the plaintiff to travel in the lorry as a passenger. In the police report the second defendant referred to the plaintiff as his employer when he used the words "towkey saya". Thus it was more probable that not only had the second defendant not directed the plaintiff's attention to a label "Riding At Your Own Risk", if any, affixed in the driver's cabin but the second defendant had also failed to warn the plaintiff that he was travelling in the lorry at his own risk.

I was of the view that the plaintiff had not travelled in the lorry voluntarily and freely agreeing to undergo the risk that he might incur therefrom nor did the plaintiff know that he so travelled therein at his own risk. In the circumstances, the first defendants were vicariously liable for the negligence of the second defendant who was their employee at the material time.

I did not direct my mind to the issue whether or not the second defendant when he allowed the plaintiff to travel in the lorry had acted outside his employment, having acted in contravention of an express prohibition, since no such defence was ever pleaded by the defendants and since it was contended by the defendants that the second defendant had refused a lift to the plaintiff in the first instance.

The next issue was the amount of damages to be awarded to the plaintiff. The damages claimed by the plaintiff falls under 3 heads:

1. Special damages;
2. Loss of future earnings;
3. General damages for the shortening of the leg, other injuries and sufferings

and the plaintiff claims interest at 6% on the damages awarded and costs.

Under special damages, the plaintiff claimed transport expenses incurred by members of the family in visiting him in hospital but there was no evidence led regarding the amount of fare for each trip nor regarding the number of visits made; there was no evidence that any money was spent on food. I would disallow the claim. As to loss of earning from January 11, 1975 to February 25, 1976 amounting to $7,000, I would allow.

The plaintiff claimed that he was unable to perform any work now but the evidence he led regarding his income was not wholly satisfactory. Taking the evidence as a whole though, I found it reasonable to infer that he had earned about $500 per month prior to the accident. In his position after the accident, the plaintiff could still mitigate the total loss of income and to my mind the plaintiff was still capable of earning about $200 per month. Thus, the loss of future earning per month is calculated at $300 per month. The plaintiff was 53 years old when the accident occurred and he is expected to live until the age of 65 years. The plaintiff's expectancy of life would be 12 years. I would deduct $\frac{1}{4}$ of it for future contingencies. Hence, the multiplier would be 8 years' purchase at $300 per month.

(8 x 12 x 300 = $28,800)

General damages:

As a result of the accident the plaintiff sustained the following injuries:

1. a haematoma of the left thigh;

2. abrasions over the left forehead, the left forearm and the left loin; and
3. a fracture of the lesser trochanter with a spiral fracture of the shaft of the left femur.

The said injuries had resulted in —

(a) shortening of the left lower limb by 3½ cm;
(b) at the left hip, marked restriction of movements;
(c) abduction restricted by 30 degrees and adduction by 20 degrees;
(d) no extension of the hip was possible;
(e) flexion of the hip was less than half the normal range;
(f) at the left knee, a 5 degree fixed flexion deformity, knee could only flex to 25 degrees: virtually a stiff knee;
(g) at the left ankle, marked restriction of movements — movements approximately a quarter of the normal range;
(h) superficial scars over the outer side of left hip and over left buttock area.

The plaintiff had great difficulty in walking and he was not able to squat. The plaintiff suffered stiffness of the hip, knee and ankle from which it is very unlikely that he will recover.

For the injuries sustained, the shortening of the left leg by 3½ cm and the sufferings as a result of the injuries I would award a global sum of $20,000 at 6% interest from date of issue of the writ to date of judgment.

Costs to the plaintiff.

Order accordingly.

Solicitors: *Jackson & Masacorale; Kong Yeam & Hassan.*

NEW SERENDAH RUBBER CO. LTD. v. COLLECTOR OF LAND REVENUE, KUALA LUMPUR

[O.C.J. (Mohamed Azmi J., Fong Ying Hong & V. K. Tharmalingam, assessors) March 13, 1981]

[Kuala Lumpur — Civil Application No. 6 of 1973]

Land Acquisition — Appeal against compensation award — Method of valuation examined — Land Acquisition Act 1960, s. 38(5).

Land Acquisition — Valuation — Post notification sale considered.

The present application arose out of an objection referred to this court by the Collector of Land Revenue under section 38(5) of the Land Acquisition Act 1960, against the award of compensation of the Collector. The land concerned was a rubber estate belonging to the applicant. It covers a total area of 1199 acres 2 roods and 15 poles and is situated in two administrative districts, with the result that the acquisition was done by two different Collectors. Although the whole of Serdang Estate had been acquired, the present application concerned the portion in the Kuala Lumpur District which measured 556 acres 3 roods 15 poles.

The applicant who also owned Connemara Estate claimed for compensation for severance on the ground that Connemara Estate and Serdang Estate though 8 miles apart were being run as one unit under one management and, as a result of the acquisition, the applicant alleged that there was an increase in the management costs of Connemara Estate.

The award pertaining to 556.92 acres of the Estate was at $2,425 per acre which totalled to $1,350,531.

The Government valuer, one Mr. Khong, valued Serdang Estate as a whole totalling 1199.670 acres. He divided the land acquired into 12 lots which, in turn were divided into sections, and gave them valuation according to age or clone of the rubber trees for each lot, and also according to whether it was a rear or road frontage land, based on the value of the 8 sales. After getting a figure of $2,517 per acre, he deducted 10% for size allowance, and after giving $200,000 for value of buildings on the acquired land, he arrived at the market value of $2,425 per acre. The Collector based his award entirely on Khong's valuation.

There was evidence of sale of West Country Estate in the neighbourhood which Mr. Khong did not consider as it was a post notification sale and also as the sale was known after he had submitted his report.

The applicant claimed $7,200 per acre based on a Revised Valuation Report of 1976. The court was asked to accept the proposition that on the relevant date, April 9, 1970, the acquired land situate between Kuala Lumpur and Kajang was comparable to Sale No. 6 (Sungei Way Estate) situated between Kuala Lumpur and Klang as it stood on January 11, 1965. Sungei Way Estate had an area of 1440.562 acres and was sold at $7,200 per acre.

Held: (1) all transactions must be relevant which can afford a fair criterion of the value of the property as at the date of notification, and post notification transactions must not be ignored altogether;

(2) a post notification sale can be comparable land provided it is part of the same land or similar land in the neighbourhood. Adjustment must be made as regards time factor, size difference and other relevant factors;

(3) the clone of the rubber trees in respect of the eight sales had not been taken into account although the clone of the land acquired was considered. This was fatal to the valuation since the eight sales were supposed to be comparable with the twelve artificial lots on the acquired land;

(4) on the evidence, the applicant had discharged the burden of showing that the Collector's award was inadequate and wrong on the ground that there was serious defect in the calculation of the plot by plot method of valuation;

(5) having regard to the sale of West Country Estate (with an area of 6,774 acres which was sold about 2 years 11 months after the relevant date of valuation) at $3,500 per acre, the value for Serdang should be $3,000 per acre as on April 9, 1970;

(6) the claim for severance should not be entertained as it was a fresh item which had never been claimed before the present application was heard.

Cases referred to:-

(1) *Asst. Development Officer* v. *Tayaballi Allibhoy Bohori* A.I.R. 1933 Bom. 361, 364.
(2) *Superintendent of Lands and Surveys Sarawak* v. *Aik Hoe & Co. Ltd.* [1966] 1 M.L.J. 243, 247.
(3) *Nanyang Manufacturing Co.* v. *C.L.R. Johore* [1954] M.L.J. 69, 71.
(4) *Uttar Pradesh Government* v. *H.S. Gupta* 44 A.I.R. 1957 S.C. 202.

The following cases were also cited in argument: *Collector of Land Revenue* v. *Alagappa Chettiar* [1971] 1 M.L.J. 43; *State of Madras* v. *A.M. Nanjan* A.I.R. 1976 S.C. 651.

CIVIL APPLICATION.

S.D.K. Peddie for the applicant.

Dato' Wan Yahya bin Pawan Teh for the respondent.

Cur. Adv. Vult.